STATE OF MICHIGAN

COURT OF APPEALS

In re T. J. MORLEY, Minor.

UNPUBLISHED
October 22, 2015

No. 326103
St. Joseph Circuit Court
Family Division
LC No. 13-000354-NA

Before: TALBOT, C.J., and BECKERING and GADOLA, JJ.

PER CURIAM.

Respondent T. Smith appeals as of right from the trial court's order terminating her parental rights to a minor child, TM, under MCL 712A.19b(3)(g) and (j). We affirm.

I. BACKGROUND

This case began in April 2013, when petitioner, the Department of Health and Human Services, filed a petition asking the court to take temporary jurisdiction over TM and his three older sisters.[1] The petition alleged that respondent and TM's father had "an extensive history of domestic violence in the presence of the children," and a history of previous neglect substantiations. In May 2013, respondent admitted to engaging in domestic violence in the children's presence, and the trial court exercised temporary jurisdiction over the children.

In August 2014, petitioner filed a supplemental petition to terminate respondent's parental rights to TM. The petition summarized as follows that reunification efforts had proven unsuccessful:

> The main barrier to reunification is the mother[']s mental instability. She acts erratically and has made claims about past trauma that have proven to be false. In addition she has not seen the above minor child since May [2014] due to her non-cooperation with drug screens. To date no progress had been made towards reunification.

[1] This appeal does not involve TM's sisters.

After conducting a termination hearing, the trial court terminated respondent's parental rights to TM under MCL 712A.19b(3)(g) and (j).

II. REFEREE'S AUTHORITY

Respondent first argues that the referee who presided over most of the child protective proceedings acted without a court order authorizing him to do so, and that he was not legally authorized to preside at the termination hearing.[2] Respondent also complains that the referee did not inform her of her right to judicial review of his findings and conclusions under MCR 3.913(C), and there was no judicial review of the referee's proposed reasons for terminating her parental rights. Respondent's arguments are unpreserved because she did not object to the referee presiding at the termination hearing or any other hearing, and she did not object to his factual findings and legal conclusions, or request judicial review of his decisions. *In re AJR*, 300 Mich App 597, 600; 834 NW2d 904 (2013).

We review de novo questions involving the interpretation of a court rule. *In re AMAC*, 269 Mich App 533, 536; 711 NW2d 426 (2006). Our interpretation of court rules is governed by the same principles used in statutory interpretation. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). These principles, as explained in *In re LE*, 278 Mich App 1, 22-23; 747 NW2d 883 (2008), are as follows:

> We begin our analysis by consulting the specific language at issue. This Court gives effect to the Legislature's intent as expressed in the statute's terms, giving the words of the statute their plain and ordinary meaning. When the language poses no ambiguity, this Court need not look beyond the statute or construe the statute, but need only enforce the statute as written. This Court does not interpret a statute in a way that renders any statutory language surplusage. [Citations and quotation marks omitted.]

We review unpreserved claims for plain error affecting substantial rights. *In re Utrera*, 281 Mich App 1, 8-9; 761 NW2d 253 (2008). In general, an error affects substantial rights only if it altered the outcome of the lower court proceedings. *Id.* at 9.

Respondent first argues that the referee was improperly allowed to preside over the child protective proceedings without a court order, and that he presided over the termination hearing without authority to do so under the Michigan Court Rules. MCR 3.913 explains, in relevant part, the proper role of referees in child protective proceedings:

---

[2] The referee who presided over the termination hearing formerly represented respondent. At a November 2013 dispositional review hearing and an April 2014 permanency planning hearing, respondent waived any basis for disqualifying him from participating in the case as a referee.

> **(A) Assignment of Matters to Referees.**
>
> (1) *General.* Subject to the limitations in subrule (A)(2), the court may assign a referee to conduct a preliminary inquiry or to preside at a hearing other than those specified in MCR 3.912(A)[3] and to make recommended findings and conclusions.
>
> (2) *Attorney and Nonattorney Referees.*
>
> * * *
>
> (b) Child Protective Proceedings. Only a person licensed to practice law in Michigan may serve as a referee at a child protective proceeding other than a preliminary inquiry, preliminary hearing, a progress review under MCR 3.974(A), or an emergency removal hearing under MCR 3.974(B). In addition, either an attorney or a nonattorney referee may issue an ex parte placement order under MCR 3.963(B).
>
> (c) Designated Cases. Only a referee licensed to practice law in Michigan may preside at a hearing to designate a case or to amend a petition to designate a case and to make recommended findings and conclusions.
>
> * * *
>
> **(B) Duration of assignment.** Unless a party has demanded trial by jury or by a judge pursuant to MCR 3.911[4] or MCR 3.912, a referee may conduct the trial and further proceedings through disposition.

We conclude that the clear and unambiguous language of MCR 3.913, read together with MCR 3.911 and MCR 3.912, authorized the referee to preside over all of the child protective proceedings in this case between the dispositional review hearing and the termination hearing. MCR 3.913(A)(1) plainly contemplates that the trial court can "assign a referee to conduct a

---

[3] MCR 3.912(A) requires a judge to preside at (1) "a jury trial"; (2) "a waiver proceeding under MCR 3.950"; (3) "the preliminary examination, trial, and sentencing in a designated case"; and (4) "a proceeding on the issuance, modification, or termination of a minor personal protection order."

[4] MCR 3.911(A) provides that "[t]he right to a jury in a juvenile proceeding exists only at the trial." The right to a trial in child protective proceedings exists only at the adjudication, where the factfinder determines by a preponderance of the evidence "whether one or more of the statutory grounds alleged in the petition have been proven." MCR 3.972(E); see also *In re PAP*, 247 Mich App 148, 153; 640 NW2d 880 (2001) ("Parents may demand a jury determination of the facts in the adjudicative phase of child protective proceedings."). No right to a jury trial exists at subsequent dispositional hearings, including a termination hearing. MCR 3.977(A)(3); *In re PAP*, 247 Mich App at 153.

preliminary inquiry or to preside at a hearing other than those specified in MCR 3.912(A) and to make recommended findings and conclusions." None of the hearings over which the referee presided appear in the prohibited proceedings list under MCR 3.912(A). MCR 3.913(A)(1) also conditions a trial court's right to appoint a referee "[s]ubject to the limitations in subrule (A)(2)." The relevant subrule applicable to child protective proceedings, MCR 3.913(A)(2)(b), plainly states that only a Michigan-licensed attorney may "serve as a referee at a child protective proceeding other than a preliminary inquiry, preliminary hearing, a progress review under MCR 3.974(A), or an emergency removal hearing under MCR 3.974(B)." Respondent does not assert that the referee lacked a license to practice law in Michigan.

Respondent contends that the referee improperly presided over the termination hearing because MCR 3.913(B) restricts a referee's participation to "further proceedings through disposition." However, this argument ignores that the termination hearing comprises a part of the dispositional phase of child protective proceedings. *In re PAP*, 247 Mich App 148, 153; 640 NW2d 880 (2001).[5] Respondent claims that the referee lacked authority because the record does not contain a court order assigning him to the case. However, nothing in MCR 3.913 requires a physical copy of a court order or a transcript of a verbal command from the trial court included in the record to assign a referee to preside over child protective proceedings. Even assuming error due to the absence of a formal order assigning the referee, respondent fails to elaborate any specific prejudice, and we cannot conceive of any, arising from the lack of a specific order. See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

Respondent next claims error on the basis that the referee did not inform her of her right to judicial review under MCR 3.913(C), and because the trial court did not review the referee's proposed factual findings and legal conclusions. MCR 3.913(C) states that "the referee *must inform* the parties of the right to file a request for review of the referee's recommended findings and conclusions as provided in MCR 3.991(B)." (Emphasis added.) MCR 3.991(A)(1) provides that "a judge of the court shall review the recommendations if requested by a party in the manner provided by subrule (B)." A request for judicial review must be in writing, state the grounds for review, and be filed within seven days after the hearing or after the referee issues the proposed findings and recommendations, whichever is later. MCR 3.991(B). "The judge must enter an order adopting the referee's recommendation unless . . . the judge would have reached a different result had he or she heard the case." MCR 3.991(E). The court rules prescribing procedures in child protective proceedings "reflect standards that are essential to the administration of justice," and therefore must be followed. *In re AMB*, 248 Mich App 144, 220; 640 NW2d 262 (2001).

In this case, the referee did not advise respondent of her right to seek judicial review of his factual findings and legal conclusions, in clear violation of MCR 3.913(C). Yet, procedural errors can be harmless if they do not affect the fundamental fairness of the proceedings or

[5] See also *In re Mason*, 486 Mich 142, 154; 782 NW2d 747 (2010) (explaining that the dispositional phase includes "review hearings to evaluate the child's and parents' progress, MCL 712A.19, permanency planning hearings, MCL 712A.19a, and, in some instances, a termination hearing, MCL 712A.19b").

influence the outcome of the case. *In re AMB*, 248 Mich App at 235. Considering the significant evidence favoring termination of respondent's parental rights, which we discuss below, we do not believe there is a reasonable possibility that the trial judge would have decided the case differently even upon a proper request by respondent for judicial review. Therefore, respondent has not shown that the procedural error affected her substantial rights.

III. TERMINATION OF PARENTAL RIGHTS

Respondent next argues that the trial court erred in terminating her parental rights under MCL 712A.19b(3)(g) and (j). Respondent maintains that termination was improper because she did not receive the intensive psychological treatment she required to improve her parenting skills. The petitioner bears the burden of proving a statutory ground for termination by clear and convincing evidence. MCL 712A.19b(3); *In re Trejo*, 462 Mich 341, 350; 612 NW2d 407 (2000). "If the court finds that there are grounds for termination of parental rights and that termination of parental rights is in the child's best interests, the court shall order termination of parental rights . . . ." MCL 712A.19b(5). We review for clear error both the trial court's best-interest determination, and the court's decision that a statutory ground for termination has been proven by clear and convincing evidence. *In re Trejo*, 462 Mich at 356-357. A decision is clearly erroneous if, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003). We give great deference to a trial court's assessment of witness credibility. *In re HRC*, 286 Mich App 444, 459; 781 NW2d 105 (2009).

A. MCL 712A.19b(3)(g)

A trial court may terminate parental rights under MCL 712A.19b(3)(g) if it finds by clear and convincing evidence that "[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." In this case, the evidence clearly and convincingly established respondent's failure to properly care for, protect, or supervise TM, and the unlikelihood that respondent would be able to provide proper care and custody within a reasonable time. *In re JK*, 468 Mich at 213-214. Abundant evidence demonstrated that respondent had improperly parented TM and his sisters. Respondent admitted that the children witnessed domestic violence between her and TM's father, many witnesses agreed that during parenting times, respondent repeatedly appeared dazed or unfocused for significant portions of time, left the children unsupervised, and exhibited anger in the children's presence. Testimony also established that respondent threatened to kill herself and TM's sisters in the girls' presence, she beat one of TM's sisters with a baseball bat, and she threatened to physically harm a caseworker.

The record also demonstrates that it was unlikely respondent could rectify her barriers to reunification within a reasonable time given TM's young age. Much of the evidence at the termination hearing focused on respondent's mental health issues. On appeal, respondent does not dispute her psychological evaluations from June 2013 and January 2014, which both stated that she likely had a histrionic personality disorder. Petitioner repeatedly referred respondent for counseling and psychiatric medication reviews. Although respondent participated in some counseling sessions, the record shows that she did not fully participate in counseling or

consistently adhere to a regular medication regimen. The caseworker testified that in early 2014, respondent was referred for intensive therapy and medication reviews. However, respondent ignored petitioner's 2014 referral to Community Mental Health (CMH) to instead pursue therapy that addressed her issues with anxiety, self-esteem, healthy relationships, and timely obtaining her medications. Many witnesses testified that respondent behaved more rationally when she took her prescribed medications, but as the trial court found, respondent's regularly erratic behavior after December 2013 strongly suggested that she had not meaningfully addressed her need for regular psychiatric medication monitoring. Contrary to respondent's contention that petitioner failed to pursue reasonable efforts to reunify her with TM by neglecting to refer her for "intensive psychological treatment," the evidence established that respondent did not pursue the counseling and medication reviews that petitioner ordered. *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005). Therefore, the trial court did not clearly err in concluding that termination was warranted under MCL 712A.19b(3)(g).

B. MCL 712A.19b(3)(j)

Under MCL 712A.19b(3)(j), a court may terminate parental rights if "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." Abundant evidence established that respondent failed to meaningfully address her mental health issues and need for psychiatric medications, which contributed to her emotionally abusive and assaultive behaviors toward TM's sisters and her inability to properly supervise the children during parenting times. Several witnesses agreed that respondent's failure to address her mental illness subjected all of her children to risks of emotional and physical harm.

To the extent that respondent suggests that no evidence reasonably established any danger to TM on the basis of her "one assaultive criminal conviction involving a minor," she ignores the recognition by Michigan courts "that the parents' treatment of other children is indicative of how they would treat the child in question." *In re Foster*, 285 Mich App 630, 631; 776 NW2d 415 (2009). Respondent cites *In re Boursaw*, 239 Mich App 161; 607 NW2d 408 (1999), overruled in part on other grounds by *In re Trejo*, 462 Mich at 353-354, for the proposition that the trial court's conclusions regarding harm in this case were essentially conjecture. In *In re Boursaw*, 239 Mich App at 172, this Court held that a trial court improperly terminated parental rights under MCL 712A.19b(3)(g) and (j) after a psychiatrist testified "that with the proper motivation respondent could begin serious work on dealing with her behavior as a parent within four to six months." Respondent's lack of progress in counseling and medication reviews, and her consistent inability to properly parent TM, together with the absence of any evidence that respondent might improve in these areas within a reasonable time renders this case distinguishable. The trial court did not clearly err in terminating respondent's parental rights under MCL 712A.19b(3)(j).

C. BEST INTERESTS

We also reject respondent's final contention that the evidence did not establish that termination of her parental rights served TM's best interests. "Even if the trial court finds that the Department has established a ground for termination by clear and convincing evidence, it cannot terminate the parent's parental rights unless it also finds by a preponderance of the

evidence that termination is in the best interests of the children." *In re Gonzales/Martinez*, ___ Mich App ___, ___; ___ NW2d ___ (2015) (Docket No. 324168); slip op at 4. "The children's bond to the parent, the parent's parenting ability, and the children's need for permanency, stability, and finality are all factors for the court to consider in deciding whether termination is in the best interests of the children." *Id*. Although respondent and TM shared a bond, respondent made minimal progress toward addressing and controlling her mental illness. Respondent also made little improvement in her parenting ability, and the trial court did not err in its finding that, in light of respondent's uncontrolled mental illness and past acts of emotional abuse and physical abuse of TM's sisters, TM remained at risk in respondent's custody. *In re Foster*, 285 Mich App at 631. Further, TM had a strong need for stability and permanency. The trial court did not clearly err in finding that termination of respondent's parental rights served TM's best interests.

Affirmed.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Michael F. Gadola